

demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of 10 years.

Davis' argument regarding this statute is misplaced as she clearly ignores the language of the note in her attempt to bar recovery. (See Exhibit "3" - October 1, 1990 Promissory Note).¹ Irrespective of the statutory language quoted above, this statute does not apply to the promissory note at issue because the note plainly and unequivocally waives the requirement for a demand. Accordingly, Davis' asserted defense is waived as evidenced by the language of the note.

The promissory note states in pertinent part as follows:

...[E]ach maker, endorser, surety and guarantor of this note severally **waives demand, presentment, protest, notice of protest, suit and all other requirements necessary** to hold them or any of them and they severally agree that time of payment may be extended or a renewal note taken or other indulgence granted without notice of, or consent to, such action, without release of liability of any such party.

(Emphasis added).

Ala. Code §7-1-306 provides that "[a] claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in an authenticated record." The above waiver is part of the contract and therefore said waiver contained within the instrument supercedes the limitations imposed by *Ala. Code* §7-3-118(b). It is well-settled that where certain terms are contained within the instrument, the terms are binding. See *Little v. People's Bank of Mobile*, 96 So. 763, 766 (Ala. 1923)(waiver contained in note is valid for stated purpose).

The terms of the note itself support Defendants' contention that this debt was not intended to comport to the requirements of a bank or other commercial lending company. The language

¹All exhibits referenced herein have been previously filed with *Defendants' Motion for Summary Judgment*. However, for the convenience of the Court, Defendants refile the exhibits referred to in the instant brief with the same exhibit numbers previously assigned.

suggests the unique situation that often exists in a closely held family corporation. The flexibility of the demand requirements (as well as other requirements) worked to the benefit of Davis as the note could remain unpaid for several years until the company realized a profit. Davis now seeks to take advantage of the very structure which permitted her to enjoy the benefit of the property absent any responsibility for seventeen years. Again, the parties were aware of the debt from the inception of the note. Further, as evidenced by the correspondence in 2000, Davis was interested in refinancing the debt. To now suggest that the debt was stale or was within months of being stale is disingenuous as best. We adopt and incorporate herein the additional factual assertions made in *Defendants' Motion for Summary Judgment*.

III. DAMAGES OUTSIDE PROMISSORY NOTE

In the alternative, to the extent that the note may be unenforceable, Davis' summary judgment is still due to be denied. Davis' argument wrongfully assumes that the entire amount claimed is for the promissory note. On the contrary, as established in Dorsey's counterclaim, the corporation—of which Davis is a 30% owner—has had expenses for matters outside the promissory note over the past seventeen years. To the extent Davis seeks the benefit of that ownership, so does she bear the responsibility. It is undisputed that Davis has failed to pay any portion of the maintenance, upkeep, taxes or other expenses associated with I-65 Properties. (Exhibit "2" - Deposition of Richard Dorsey p. 123 at lines 1-6, p. 156 at lines 10-22; Exhibit "1" - Deposition of Donna Dorsey Davis p. 129 at lines 11-14; Exhibit "15" - Compilation of Expenses Owed). That expense has been borne solely by Dorsey. (Exhibit "14" - Affidavit of Richard M. Dorsey; Davis Depo. p. 129 at lines 11-14).

Accordingly, Davis' Motion for Summary Judgment is due to be denied.

IV. CONCLUSION

Wherefore the premises having been considered, the Defendants respectfully request the Court to grant the *Defendants' Motion for Summary Judgment* and deny *Plaintiff's Motion for Summary Judgment*.

Respectfully Submitted this 27th day of April, 2007.

RICHARD M. DORSEY, as an individual, and
CD&O, LLC, as a necessary party,

/s/ Clifford W. Cleveland
CLIFFORD W. CLEVELAND

OF COUNSEL:
CLEVELAND & COLLEY, P.C.
744 East Main Street
Prattville, AL 36067
(334) 365-1500 phone
(334) 365-1601 fax

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing *Defendants' Memorandum Brief in Opposition to Plaintiffs' Motion for Summary Judgment* with the Clerk of the Court for the United States District Court, for the Middle District of Alabama, Northern Division, using the CM/ECF system which will send notification of such filing to Lindsay B. Erwin, Esquire (lindsayerwin@gmail.com) and James Edward Roberts, Esquire (attyjuris@aol.com) this the 27th day of April, 2007.

/s/ Clifford W. Cleveland

OF COUNSEL

EXHIBIT “1”

Deposition of Donna Dorsey Davis

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DONNA DORSEY DAVIS,
Plaintiff,

vs. CASE NO. 2:06CV766-MHT

RICHARD M. DAVIS, etc.,
and CD&O, LLC, etc.,
Defendants.

* * * * *

DEPOSITION OF DONNA DORSEY DAVIS, taken
pursuant to stipulation and agreement before Dee
Coker, Registered Professional Reporter and
Commissioner for the State of Alabama at Large,
in the Law Offices of Cleveland & Colley, 744
East Main Street, Prattville, Alabama, on
Tuesday, March 13, 2007, commencing at
approximately 9:15 a.m.

* * * * *

DUNN, KING & ASSOCIATES
Montgomery, Alabama

(224) 262-0261 or (206) 350-0001

1 never been just clear from the beginning.

2 Q. Do you have any idea of the cost that would
3 be associated --

4 A. I don't, no.

5 Q. -- with bringing it to the level that you
6 want it?

7 A. No.

8 Q. Would you acknowledge that all of that costs
9 money?

10 A. Yes.

11 Q. Okay. Have you spent any money whatsoever on
12 maintaining or taking care of the I-65
13 property?

14 A. No.

15 Q. Look at paragraph number 21.

16 A. Okay.

17 Q. Is it your contention that there have been
18 profits made and that there are dividends to
19 be distributed which have not been
20 distributed?

21 A. I don't know.

22 Q. Do you know of any fact that would indicate
23 that I-65 has made a profit?

EXHIBIT “2”

Deposition of Richard Dorsey

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DONNA DORSEY DAVIS,

Plaintiff,

vs.

CASE NO. 2:06CV766-MHT

RICHARD M. DORSEY, etc.,
and CD&O, LLC, etc.,

Defendants.

* * * * *

DEPOSITION OF RICHARD M. DORSEY, taken
pursuant to stipulation and agreement before Dee
Coker, Registered Professional Reporter and
Commissioner for the State of Alabama at Large,
in the Law Offices of Cleveland & Colley, 744
East Main Street, Prattville, Alabama, on Monday,
March 12, 2007, commencing at approximately
10:03 a.m.

* * * * *

1 against Donna individually. Can you help me
2 with why TD&O has anything to do with this?

3 A. TD&O has been one of the companies that I've
4 borrowed money for, for I-65.

5 Q. Oh, I got you.

6 A. To pay property taxes, maintenance, upkeep.

7 Q. Okay. Got you. And will that show --
8 here's -- it's all marked up, so I almost
9 hate to use it, but this was furnished at a
10 point. I think Ms. Perry did it. It was
11 furnished to my client. Forget all the
12 writing. She took notes. It's the only copy
13 she had. So will that show on here? It's
14 got loans Dorsey Motors, Dorsey Motors. I
15 haven't studied it. I didn't see TD&O on
16 here.

17 A. I haven't seen the document.

18 Q. Okay. Well, we'll go to that -- well, we may
19 as well go to it, because I'm trying to
20 ascertain how TD&O -- I didn't know they
21 were, because you told me it's Taylor. So
22 we'll go ahead and use this document.

23 MR. ROBERTS: Now, I don't have a clean

1 A. That's correct.

2 Q. All right. Read the rest of that. I've let
3 you read it off the record, but read the rest
4 of it. I just want to be sure, since you
5 weren't sure of that -- and I'm trying not to
6 take a lot of time, but I-65 didn't pay cash
7 but tendered a mortgage. No problem with
8 that, right?

9 A. Yes.

10 Q. Yes. She can't read it a head shake.
11 Subsequent to the corporation acquiring the
12 real state, there have been ongoing costs,
13 such as property taxes, annual franchise
14 privilege. You don't have a disagreement
15 with that. We have a document that appears
16 to be ongoing costs, correct?

17 A. Yes.

18 Q. All right. And there were -- as time passed,
19 you don't have any argument that you either
20 paid some of those expenses or put money into
21 the account to pay the expenses, correct?

22 A. Correct.

23 Q. Okay. That's #9. Following up, we have

EXHIBIT “3”

**October 1, 1990 Promissory Note
from I-65 Properties to Dorsey Motor Sales**

GEORGE P. WALTHALL, JR
ATTORNEY AT LAW
141 WEST MAIN STREET
PRATTVILLE, ALABAMA 36067
205/365-2255 (OUR FILE NO. 90-412.BO)

PROMISSORY NOTE

\$228,200.00

For value received, the undersigned promises to pay to the order of DORSEY MOTOR SALES, INC. the principal sum of TWO HUNDRED TWENTY EIGHT THOUSAND TWO HUNDRED AND NO/100 DOLLARS (\$228,200.00), with interest thereon from date at the rate of twelve (12.0%) percent per annum. the principal and interest payable as follows, namely:

Due and payable on demand.

Payable at the office of DORSEY MOTOR SALES, INC., 625 East Main Street, Prattville, Alabama 36067 or such other place as the holder of the note may designate.

In the event of default in the payment of any installment of principal or interest the entire indebtedness shall become due and payable at once and in full at the option of the holder thereof.

The parties of this instrument, whether maker, endorser, surety or guarantor, each for himself hereby severally waives as to this debt, or any renewal thereof, all rights of exemption under the Constitution and Laws of Alabama, or of any other state, as to personal property, and they each severally agree to pay all costs of collection or securing or attempting to collect or secure this note, including a reasonable attorney's fee, whether the same be collected or secured by any attorney consulted, with reference to suit or otherwise. And each maker, endorser, surety and guarantor of this note severally waives demand, presentment, protest, notice of protest, suit and all other requirements necessary to hold them or any of them and they severally agree that time of payment may be extended or a renewal note taken or other indulgence granted without notice of, or consent to, such action, without release of liability of any such party. This note may be declared due and payable with interest computed or abated to date at anytime by notation hereon by the holder in the event of the insolvency of, general assignment by, judgment against or petition in bankruptcy by or against any such party liable hereunder, subject to terms of mortgage.

DONE this 1 day of Oct, 1990.

I-65 PROPERTIES, INC.

Richard M. Dorsey A-3
by: RICHARD M. DORSEY, President.

ATTEST:

Connie S. Dorsey
CONNIE S. DORSEY, Secretary

Sworn to and subscribed before me this the 1 day of October, 1990.

Jo Anne Pennington
NOTARY PUBLIC

EXHIBIT

3

Exhibits

EXHIBIT “14”

Affidavit of Richard M. Dorsey

STATE OF ALABAMA

COUNTY OF AUTAUGA

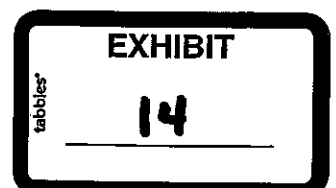
AFFIDAVIT OF RICHARD M. DORSEY

Before me, the undersigned authority in and for said County and State, personally appeared Richard M. Dorsey, who is known to me and who being first duly sworn, deposes and says:

"I make this affidavit based upon my own personal knowledge. I am a Defendant in this case and a shareholder in I-65 Properties, Inc. I-65 Properties, Inc. consists of undeveloped real estate located in Elmore County, Alabama. This is real estate my father and I purchased as an alternative to expand our automobile business. At my father's direction, this property was transferred into I-65 Properties, Inc. with my holding 70% of the stock and my sister Donna holding 30% of the stock. We are the only two (2) stockholders of I-65 Properties, Inc. I-65 Properties, Inc. assumed the mortgage on the property as part of the purchase price.

For many years, I-65 Properties, Inc. had no income and within the last few years I have been successful in leasing billboard space on this property. This is the only income the corporation has. Throughout all these years I have personally or through companies which I own made all payments on behalf of the corporation including the mortgage payments to the prior owners of the property, tax payments, insurance payments, accounting expenses and any other costs associated with the corporation. My sister has incurred no expense on behalf of the corporation.

I have provided my sister, either directly or indirectly, with copies of income tax returns prepared by Diamond, Roller, Taunton & Carmichael, P. A. I have also instructed Alan Taunton with Diamond, Roller, Taunton & Carmichael, P. A. to meet with my sister or her attorney and

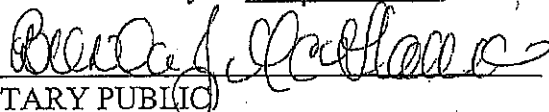


make all books and records of I-65 Properties, Inc. available to them. It is my understanding that they have not availed themselves of this offer."

Further affiant sayeth not.


RICHARD M. DORSEY

SWORN TO and SUBSCRIBED before me this the day of 18th September, 2006.


NOTARY PUBLIC

My Commission Expires: 9/17/2007

EXHIBIT “15”

Compilation of Expenses Owed

WASLEY MORGAN SAYS BUREAU PROPERTY
 THEY DID TRANSFER TO BUREAU CAMP
 YOU HAVE GIVING US PART
 OF OUR 3 DICK FORMED I-65 PROPERTIES
 PICK GOT DEEDSHEAT ACCORDING TO HIM WHEN I-65 PROPERTIES
 WAS FORMED
 (GENERAL AGREEMENT WITH DAD)
 VERBAL AGREEMENT WITH DAD
 DAD TOOK A NOTE BACK FROM I-65 INC.

I-65	PROPERTIES EXPENSES	1998	DATE	LOANS	AMOUNT
1990					
17-Dec	Alabama Dept of Revenue		13-Nov	Dorsey Motors	\$ 4,000.00
28-Dec	Bob Gray		13-Nov	Dorsey Motors	\$ 1,000.00
					\$ 5,000.00
1991					
10-Jan	Ralph Bennett				\$ 2,700.00
7-Feb	Carmichael & Carmichael				\$ 1,250.00
17-Mar	Alabama Dept of Revenue				\$ 70.00
11-Jun	Carmichael & Carmichael				\$ 500.00
3-Jul	Ralph Bennett		29-Jul	Dorsey Motors	\$ 3,000.00
9-Sep	Benair Helicopters				\$ 95.00
17-Sep	U S Postmaster				\$ 49.00
22-Nov	Southern Survey & Design				\$ 1,000.00
22-Nov	Goodwin Mills and Cawood		22-Nov	Dorsey Motors	\$ 2,000.00
	Regions Bank				\$ 78.05
					\$ 9,742.05
1992					
29-Jan	Ralph Bennett				\$ 6,800.00
22-Jan	Southern Survey and Design		22-Jan	Dorsey Motors	\$ 600.00
13-Mar	Alabama Dept of Revenue		29-Jan	Dorsey Motors	\$ 7,000.00
20-May	Southern Survey and Design		20-May	Dorsey Motors	\$ 1,000.00
22-Sep	U S Postmaster		15-Oct	Dorsey Motors	\$ 1,000.00
14-Oct	Goodwyn Mills and Cawood				
9-Nov	Wm "Mike" Harper				\$ 535.44
	Regions Bank		31-Dec	Dorsey Motors	\$ 600.00
					\$ 10,070.19

(PROPERTY
 HAD BEEN
 MINAISED AMT?
 AS TOOK A
 NOTE FROM
 BACK FOR
 THAT AMT
 BELAWE
 OF LITIGATION
 MOTIVATING
 FREEDOM

EXHIBIT

X (1992 MISSING ON LIST

THESE SIX (6) PAGES

GIVEN AT DEC 19, 2005
 STANLEY NEEDS A COPY OF IT - 1/6

tabbles

15

3/6

1996									
11-Jan	Crumpton and Davis	Millbrook Sewer	\$ 783.75	11-Jan	Dorsey Motors	\$ 800.00			
12-Mar	Alabama Department of Revenue	96 Franchise Tax	\$ 70.00						
22-Aug	Alabama Department of Revenue	Tax Penalty	\$ 50.00						
21-Oct	McDowell, Faulk & McDowell	K Bar K Legal	\$ 2,000.00	21-Oct	Dorsey Motors	\$ 2,000.00			
16-Dec	Wm M "Mike" Harper	96 Property Tax	\$ 835.20	18-Dec	Dorsey Motors	\$ 1,000.00			
	Regions Bank	Service Charges	\$ 88.25						
			\$ 3,827.20			\$ 3,800.00			
1997									
12-Mar	Alabama Department of Revenue	97 Franchise Tax	\$ 70.00						
17-Sep	U S Postmaster	P O Box Rent	\$ 58.00						
	Regions Bank	Service Charges	\$ 104.77						
			\$ 232.77						
1998									
17-Sep	U S Postmaster	P O Box Rent	\$ 58.00	17-Sep	Dorsey Motors	\$ 100.00			
14-Dec	Wm M. "Mike" Harper	U S Postmaster	\$ 1,009.20	14-Dec	Dorsey Motors	\$ 1,000.00			
	Regions Bank	Service Charges	\$ 117.29						
			\$ 1,184.49			\$ 1,100.00			
1999									
4-Jan	Alabama Dept Of Transportation	Billboard Permit	\$ 25.00	4-Jan	Dorsey Motors	\$ 100.00			
4-Jan	Alabama Dept Of Transportation	Billboard Permit	\$ 25.00						
10-Mar	Department of Revenue	99 Franchise Tax	\$ 70.00	10-Mar	Dorsey Motors	\$ 100.00			
27-Sep	U S Postmaster	P O Box Rent	\$ 64.80	27-Sep	Dorsey Motors	\$ 200.00			
7-Dec	Wm M "Mike" Harper	Property Tax	\$ 1,253.74	7-Dec	Dorsey Motors	\$ 1,500.00			
7-Dec	Diamond, Roller, Taunton	Accounting Serv	\$ 64.80						
	Regions Bank	Service Charges	\$ 116.67						
			\$ 1,620.01			\$ 1,900.00			

4/6

[illegible]

2003		PSE Tax				
14-Mar	Alabama Department of Revenue		\$ 100.00	Dick Dorsey		\$ 1,000.00
14-Mar	Cleveland and Colley	Legal Fees	\$ 900.00			
14-May	Diamond, Roller Taunton	Accounting Fees	\$ 862.58	14-May	T D & O, Inc	\$ 3,000.00
14-May	Cleveland and Colley	Legal Fees	\$ 2,000.00			
24-Jul	Diamond, Roller Taunton	Accounting Fees	\$ 450.00	24-Jul	Dick Dorsey	\$ 500.00
30-Sep	U S Postmaster	P O Box Rent	\$ 68.00			
10-Dec	Wm M "Mike" Harper	Property Tax	\$ 835.20	10-Dec		\$ 850.00
	Regions Bank	Service Charges	\$ 143.35			
			\$ 5,359.13			\$ 5,350.00
2004						
17-Feb	Cleveland & Colley	Legal Fees	\$ 403.12	17-Feb	Dick Dorsey	\$ 750.00
17-Feb	Diamond, Roller, Taunton	Tax Return	\$ 330.00			
12-Mar	Ala Department of Revenue	2004 PSE Tax	\$ 100.00	12-Mar	Dick Dorsey	\$ 500.00
27-Sep	US Postmaster	P O Box Rent	\$ 68.00			
15-Sep	Ala Dept of Revenue	2004 Priv Tax	\$ 10.00			
27-Sep	Diamond, Roller, Taunton	Tax Return	\$ 200.00			
	Regions Bank	Service Charges	\$ 142.08			
			\$ 1,253.20			\$ 1,250.00

2005

15-Mar	Ala Department of Revenue	2005 PSE Tax	\$ 100.00
15-Sep	Ala Department of Revenue	Privilege Tax	\$ 10.00
27-Sep	U S Postmaster	P O Box Rent	\$ 68.00
22-Nov	Diamond, Roller Taunton & Carmic	Tax Preparation	\$ 500.00
	Wm M "Mike" Harper	Property Tax	\$ 835.20
	Regions Bank	Service Charges	
			\$ 1,513.20

Owed to Dorsey Motor Sales

Plus Interest

\$ 35,900.00

\$ 2,000.00

LOWN
FROM
\$ 2,000.00

TO DO ADVERTISING
TO 7-45 PROPERTIES
TO PAY ALL OF
THE EXPENSES.

TO DO
ADVERTISING

5/12